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IN THE

# Supreme Court of the United States

**October Term, 1974**

**No. 74-909**

J. HOWARD SMITH, INC., J. H. BAKER & BRO. INC., WILBUR ELLIS COMPANY, INTERNATIONAL PROTEINS CORP., CARGILL, INC. and GLOUCESTER BY-PRODUCTS INC.,

*Petitioners,*

v.

S.S. MARANON, her engines, boilers, etc., and CORPORACION PERUANA DE VAPORES,

*Respondents.*

## PETITIONERS' REPLY TO BRIEF OF RESPONDENT IN OPPOSITION

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## ADDITIONAL AUTHORITIES CITED

32 Cornell Law Quarterly (1946-47) ..... 2

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The confusion which has permeated this case is exemplified by respondent's brief in opposition. The argument therein presented is based on the assumption that the rule of the Second Circuit is the controlling law to be applied when a carrier alleges that because of the nature of the cargo, inherent vice may have been the cause of the damage. Thus respondent maintains that in considering the defense of the fire exemptions alleged by the carrier under 46 U.S.C. Section 182 and 46 U.S.C. Section 1304(2)(b) the lower courts properly imposed as a prerequisite to petitioners' case that they establish the actual order and condition of their respective cargoes by evidence independent of the bills of lading. Respondent has said that this does not involve a federal issue. However, there remains the initial question of whether the Second Circuit rule as projected in this case

is a proper limitation on the provisions of the Carriage of Goods by Sea Act and general maritime law. From the error into which the courts below have fallen in expanding the Second Circuit's rule and the confusion which has resulted as shown by respondent's brief, it would appear that the courts of the Second Circuit in the course of developing this rule would have been well advised to have given due consideration to the admonitions set forth in the paper which was delivered by Max Radin to the Conference of Judges of the Ninth Circuit as reported in 32 Cornell Law Quarterly (1946-47) at page 137 under the title, "The Trail of the Cal f."

In holding that the petitioners had to establish in each instance the good order and condition of their respective cargoes by evidence beyond the bills of lading, the lower courts so attenuated the probative value of petitioners' evidence as to foreclose petitioners from establishing that respondent was at fault with respect to the fires; that respondent failed to protect the cargo and prevent aggravation of the damage once the dangerous condition was discovered, and that respondent and its agents and employees including the master were at fault with respect to the general average incident, to wit: the fires.

In view of the position taken by both lower courts, it would have been surprising indeed if petitioners had prevailed on any of these contentions, since the rejection of the bills of lading preordained the decision that was arrived at. If, on the other hand, the bills of lading had been given the significance required by the Carriage of Goods by Sea Act, then in applying maritime law the petitioners should have prevailed for the preponderance of evidence established that respondent was liable for the damage. Respondent's contention that it was not responsible for the fires or that it had not assumed control at the Canal rested almost entirely

upon the testimony of the master, which was the only evidence that was referred to by the lower courts. In this regard, it is respectfully called to the Court's attention that the Court of Appeals in considering the evidence commented that the messages which were interchanged among respondent, its agents and the master were subject to different interpretations which the District Court was required to resolve.

Similarly, if the bills of lading had been accepted, the lower courts would not have summarily disposed of petitioners' contention that respondent was liable for the failure to properly protect the cargoes and prevent aggravation of the damage after the imminent peril had been discovered. The only findings in support of respondent's case in this regard was that of the District Court that the master was not negligent in failing to employ the $CO_2$ system on the ground that there was testimony that the use of carbon dioxide might cause condensation. The Court of Appeals in accepting this finding added that there was testimony that the conduct of the crew and captain had actually minimized damage. The testimony with regard to the finding and this conduct was taken out of context and given a meaning which neither of the witnesses intended. See Petition, pages 8 and 9.

Finally, with respect to respondent's counterclaim for general average contributions, as pointed out by the Court of Appeals the right to this relief depended upon whether or not respondent or its agents and employees were negligent in creating the general average incident. Notwithstanding the fact of the absence of entries for ventilation in the ship's log, the District Court accepted the master's testimony and held that the cargo had been adequately ventilated. The Court of Appeals, acknowledging the con-

flict in the evidence, affirmed the finding with the comment that it was for the District Court to resolve.

There are three additional matters referred to in respondent's brief which require clarification. The first deals with the question of whether or not fires first occurred before the Canal Zone. Respondent who had been advised of pre-Canal Zone fires, directed that a surveyor examine the cargo when the ship arrived in the Canal. However, the surveyor employed (Mr. Beech) was not advised of these fires. Accordingly, his examination of the cargo was limited to the taking of temperatures. He testified that if the fires had been reported, an entirely different procedure would have been adopted and that pursuant to Canal Zone law the fire brigade would have boarded the ship and insisted on clearing it. Such fires, he said, should have been reported to the Canal Zone authorities (326 line 16 to 331 line 23). Thus, the determination of when the ship first experienced fires is critical in assessing both respondent's and the master's conduct at the Canal Zone.

The second concerns the application of the "clearly erroneous" rule. Respondent has referred to the fact that six witnesses testified in person at the trial and only two depositions were offered. Of these, six witnesses however, two were experts, one of whom testified concerning the chemical properties of fishmeal generally, and the other gave evidence concerning stowage and care of fishmeal cargo. The remaining four were fact witnesses. One testified concerning the general average adjustment. Another testified concerning cargo damage and crew activity at Savannah. The third testified concerning the origin of the certificate of inspection for the Matarani cargo. The fourth testified as to activity at respondent's home office during the course of the voyage which in the main concerned re-

had been put in evidence by respondent. Substantially all of the evidence dealing with the events that occurred during the voyage was contained in the depositions of the master and respondent's surveyor Leech as well as in the documentary evidence consisting principally of documents introduced by respondent.

Finally, it is noted that the respondent's brief in opposition elected to ignore the fact that although there were 16 separate shipments involved herein, the courts below found that the fires and overheatings originated in only one of them. By doing so, respondent attempts to explain the lower courts' requiring all petitioners to meet the same degree of proof regarding the pre-shipment condition of their respective cargoes, in spite of the holding to the contrary in the *American Tobacco Co.* v. *The Katingo Hadjipatera* 81 F Supp. 438. Respondent would have it inferred that both courts found that all the cargoes became damaged as the result of an internal rather than an external cause, and thereby justify the unwarranted extension of the Niel Maersk doctrine to the 15 non-Matarani cargoes.

It is clear then that the fundamental issue in this case is the effect to be given an ocean bill of lading for the purpose of allocating between carrier and cargo owner their respective rights and liabilities. If the decision is allowed to stand, then in any case where because of the nature of the cargo the defense of inherent vice is alleged, the provisions of COGSA will be negated regardless of how the damage in fact came about. Thus, even if the Second Circuit's rule was not criticized by other circuits, but rather was universally adopted as the desired interpretation of the Carriage of Goods by Sea Act and the general maritime law, the question would still require final resolution by this

Tribunal. The purpose of the Hague Rules from which the U.S. COGSA evolved was to attain uniformity in international transportation by sea. As an esssential part of that scheme the *prima facie* integrity of a clean bill of lading as a commercial document must be preserved; otherwise, chaos in international trade will ensue.

## CONCLUSION

**For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted.**

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